borrowed by the defendant were repaid. In those circumstances I do not propose to interfere with his finding.

There is a small point taken by counsel for the appellant on a letter written by the defendant to one of his witnesses which is said to be an admission by the defendant that the loan had not been repaid in the sense that the car belonging to the defendant was in fact sold not to the plaintiff/appellant but to a witness Jeet Singh. Whether or not that is an admission under section 17 or 18 of the Evidence Ordinance, it is unnecessary for me to express an opinion. Even accepting that it comes within the provisions of those two sections nonetheless it cannot be so conclusive where there is the testimony of witnesses and especially from the documentary evidence of exhibit D3 which is a document as I understand it stating that the amount claimed by the plaintiff had been repaid by the defendant, as to justify the trial judge from completely ignoring the oral testimony presented to him at the trial.

In my opinion there is no substance whatsoever in this appeal and I would accordingly dismiss it with costs.

Thomson L.P. (delivering oral judgment): I agree with what my Lord has said and would only refer to what was said by Lord Shaw in confirmation in the case of *Clarke* v. *Edinburgh and District Tramways Co. Ltd.*[1] as quoted in the House of Lords by Lord Thankerton in *Thomas* v. *Thomas* [2] and in the Privy Council by Lord Guest in the recent Singapore case of *Tay Kheng Heng* v. *Heap Moh Steamship Co. Ltd.*: [3]

"In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

I find myself in the same state of mind as Lord Shaw did in that case.

The appeal should be dismissed with costs.

Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: *Elias Bros.; Murugason & Co.*

CAPITOL LIMITED v. OW LEUNG & ORS.

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) April 26, 1965]

[Singapore — Federal Court Civil Appeal No. 82 of 1963]

Contract — Agreement granting licence to run restaurant — Breaches of agreement — Waiver — Provision for termination — Licence terminating agreement by re-entry — Claim for damages — Proof of damages.

The plaintiff company was the owner of a restaurant and by an agreement in writing dated November 4, 1960 they engaged the defendants to run the restaurant for a period of 3 years from November 1, 1960. The defendants committed breaches of the agreement and eventually the plaintiff company in accordance with the agreement re-entered upon the premises of the restaurant and resumed control of it. The plaintiff company thereupon claimed the balance of guaranteed minimum payment under the agreement and damages. The first defendant in his defence pleaded that the plaintiff company was not entitled to terminate the agreement or close the restaurant and by way of counterclaim claimed damages for the wrongful closure of the restaurant and the wrongful repudiation of the agreement. At the trial judgment was given for the plaintiff company for the sum of $1,487.86 and disbursements while on the counterclaim, the sum of $1,500 was awarded to the defendants by way of damages. The defendants on appeal contended *inter alia* that (a) the plaintiff company had waived the breaches of the agreement committed by the defendants (b) as the plaintiff company failed to give notice to the defendants of its intention to terminate the agreement it could not rely on the breaches for terminating the agreement.

Held: (1) there was no waiver by the plaintiff company of its rights after the end of June 1961. The true view of the position was that there was forbearance on the part of the plaintiff company for which no consideration was given by the defendants;

(2) the agreement gave the plaintiff company a right to terminate the defendants' engagement and forthwith resume control of the restaurant and the licence was therefore lawfully terminated by the unequivocal act of the plaintiff company in re-entering the restaurant and taking possession thereof;

(3) no evidence was given by the plaintiff company that any endeavour had been made to obtain the services of some other person to run the restaurant and therefore their claim for damages was rightly dismissed.

Further no evidence was given in relation to the damages claimed on the counterclaim and therefore the awards for damages on the counterclaim should be set aside.

Cases referred to:—

(1) *Minister of Health* v. *Bellotti* [1944] 1 All E.R. 238 at p. 242.

(2) *Bonham-Carter* v. *Hyde Park Hotel Ltd.* (1948) 64 T.L.R. 177 at p. 178.

FEDERAL COURT.

L. Rayner for the appellant.

K. K. Bezboruah for the respondent.

Tan Ah Tah F.J.: The plaintiff company is the owner of the Capitol Restaurant. By an agreement dated the 4th November 1960 and made between the plaintiff company as owner of the first part, the defendants as contractors of the second part and the second and third defendants as sureties of the third part, the plaintiff

company engaged the defendants for a period of three years from the 1st November 1960 to run the Capitol Restaurant and certain other premises in the same building as a restaurant. In pursuance of this agreement the defendants commenced to run the restaurant. However, before many months were over, the defendants committed various breaches of the terms of the agreement. Correspondence ensued between the plaintiff company or its solicitors and the defendants and at least one discussion was held between the parties. This was followed by further correspondence. Eventually, on the 17th November 1961, the plaintiff company re-entered upon the premises of the Capitol Restaurant and resumed control thereof.

In due course a writ of summons was issued on behalf of the plaintiff company against the defendants. The indorsement of claim made on the writ was as follows:—

"The plaintiff's claim against the defendants is for $14,923.53 whereof $1,487.86 is the balance of arrears of guaranteed minimum payment of the Capitol Restaurant at $3,000 per mensem and other charges from the 6th February, 1961 to November, 1961 and $13,435.67 being ascertained and liquidated damages including other charges from the 1st December, 1961 to 31st March, 1962 for breach of an agreement dated the 4th day of November, 1960 committed by the defendants."

Pleadings were subsequently filed on behalf of the parties. In the defence of the first defendant it was alleged that the plaintiff company was not entitled to terminate the agreement or close the restaurant. By way of counterclaim, the first defendant therefore claimed damages for what he alleged was the wrongful closure of the restaurant and the wrongful repudiation of the agreement.

The action was duly heard in the High Court in Singapore. In the result, so far as the claim was concerned, judgment was given for the plaintiff company for the sum of $1,487.86 plus all sums due to the Public Utilities Board and Singapore Telephone Board which had to be paid by the defendants up to the 17th November 1961, while on the counterclaim, the defendants were awarded the sum of $1,500 by way of damages. It is against this decision that this appeal has been brought by the plaintiff company.

It is convenient at this stage to refer to clauses 3, 27 and 30 of the agreement which read as follows:—

"3. Irrespective and regardless of the monthly gross sales and takings at the Restaurant, the Contractors specifically agree and undertake to pay to the Owner the sum of $3,000 (dollars three thousand) only being the Minimum Guarantee payable by the Contractors to the Owner in consideration of the engagement as Contractors to run and operate the Restaurant handed over to the Contractors as a going concern the first of such payments has been made in advance on the date of signing this Agreement and thereafter each succeeding month in advance. Failure on the part of the Contractors to pay the aforesaid minimum guaranteed amount of $3,000 (dollars three thousand) on due date shall entitle the Owner to apply the Deposit referred to in Clause Twenty-seven (27) hereof towards any unpaid monthly minimum guarantee. If the Contractors shall at any time be in arrears as regards the minimum guarantee payable to the Owner then the Owner shall be at liberty to terminate the Contractors engagement and forthwith resume control of the Restaurant, and operate same for and on the Owner's own account and until such time when another Contractor is found willing to operate the Restaurant under the same terms and conditions as herein contained the Owner shall be entitled to claim and recover from the Contractors and the Contractors shall remain liable to the Owner, in damages calculated at $3,000 (dollars three thousand) per month from the time of the Owner's resumption of control for the remaining term of 3 year period of this Agreement."

"27. As a guarantee of good faith the Contractors have deposited with the owner the sum of $15,000 (dollars fifteen thousand) to be held by the owner free of interest during the period of this Agreement. At the determination of this Agreement, the owner shall be entitled to deduct from the said sum of $15,000 (dollars fifteen thousand) any sums due to the owner by the Contractors under any other provision of this Agreement and the balance thereto shall be immediately repaid to the Contractors."

"30. The breach or nonfulfilment on the part of the contractors of any Clause contained in this Agreement shall give the owners the right to terminate the Contractor's engagement and forthwith resume control of the Restaurant and operate the same for and on the owner's own account or to employ some other person to manage the Restaurant on similar terms to those contained in this Agreement. In such an event the Contractors shall be liable to pay damages to the owners calculated at $3,000 (dollars three thousand) per month for the period between the determination of this agreement and the time when the owners commence to operate the Restaurant themselves or employ some other person to do so. And it is expressly provided that in the event of the agreement being terminated under the provision of this Clause the Owners will use their best endeavours to obtain the services of some other person to run and manage the Restaurant on terms similar to those contained in this Agreement and they shall not refuse any reasonable offer from any person of good character. It is also expressly provided that failure on the part of the Owners to exercise their rights under this Clause shall in no way be construed as a cancellation of this Clause."

It is common ground that under the agreement the defendants were granted a licence to occupy and use the Capitol Restaurant as a restaurant. In pursuance of clause 27 the sum of $15,000 was duly deposited by the defendants with the plaintiff company. In the middle of 1961 the defendants failed to pay what was referred to in clause 3 as the minimum guaranteed amount being the sum of $3,000 payable every month in advance during the period of the agreement. Payment of the minimum guaranteed amounts in respect of certain months was demanded from the defendants who were also informed that they had committed other breaches of the agreement. On the 18th August 1961 the then solicitors for the plaintiff company wrote a letter to the defendants giving them notice that in view of the fact that they had committed several breaches of the agreement, the licence granted to them would be terminated on the 24th

August 1961, on which date the plaintiff company or its agents would re-enter upon the Capitol Restaurant and resume control thereof. Subsequently, after a further extension of time had been granted to the defendants, a discussion took place between the parties concerned on the 25th August 1961. As a result of this discussion, the following letter dated the 25th August 1961 was sent by the defendants to the plaintiff company:—

"This is to confirm the discussion we have had in our office this afternoon in which we hereby undertake to make the following payments to you:—

The sum of $4,000 is to be paid on or before the 20th day of September 1961 and thereafter we undertake to pay in accordance with the Agreement signed on 4th November, 1960, the sum of $3,000 together with an additional $1,000 being part payment of the arrears outstanding with the balance to be settled in full on the 1st day of January 1962."

As no payment was received from the defendants, the plaintiff company's secretary wrote a letter dated the 10th October 1961 to the first defendant in the following terms:—

"Reference your letter of 25th August, we would like to remind you that the sum of $4,000 is still unpaid.

Kindly let us have your cheque for $8,000 (dollars eight thousand only) i.e. $6,000 being Minimum Guarantee for July & August and the balance of $2,000 being part payment against the arrears outstanding."

On the 1st November 1961 the first defendant wrote to the plaintiff company's secretary apologising for the delay and promising to settle the account on or before the 30th November.

On the 11th November 1961 the plaintiff company's secretary sent a reply to the first defendant requesting that payment be made as soon as possible and stating that if the account was not settled by the 14th November 1961 the matter would be placed in the hands of the plaintiff company's solicitor.

On the 17th November 1961, no payment having been made by the defendants, the plaintiff company, as I have stated, re-entered upon the premises of the Capitol Restaurant and resumed control thereof.

It was contended by counsel for the defendants in the court below that the plaintiff company had waived the breaches of the agreement which had been committed by the defendants. The learned trial judge appears to have accepted this submission as he expresses the view that the plaintiff company waived its rights at least up to the 25th August 1961, being the date on which the defendants' letter was written. In my opinion, there was no waiver by the plaintiff company of its rights after the end of June 1961. The true view to take of the position between the parties is that there was forbearance on the part of the plaintiff company for which no consideration was given by the defendants.

It is not in dispute that breaches of certain other terms of the agreement continued to be committed by the defendants even after the 25th August 1961. The learned judge came to the conclusion that as the plaintiff company failed to give notice to the defendants of its intention to terminate the agreement, it could not rely on these breaches for the purpose of terminating the agreement.

In considering the question of notice terminating the agreement, it is relevant to refer to the following passage from the judgment of Lord Greene M.R. in *Minister of Health* v. *Bellotti*:[1]

"Where a licence is granted under a contract, it may very well be that the contract will make express provision for those matters. Where it does, these express provisions with regard to termination of the licence and so forth must be observed."

In both clauses 3 and 30, the right of the plaintiff company to terminate the defendants' engagement and forthwith resume control of the Restaurant is expressly stated. In my opinion, applying Lord Greene's dictum to the facts of this case, the licence was lawfully terminated by the unequivocal act of the plaintiff company in re-entering the Capitol Restaurant on the 17th November 1961 and taking possession thereof.

It was contended by counsel for the defendants that the plaintiff company was under an obligation to apply the deposit of $15,000 in payment to itself of sums due but not paid by the defendants. In my view, the plaintiff company was under no such obligation to do so. Clauses 3 and 27 contain provisions entitling it to do so but those provisions do not make it obligatory on the part of the plaintiff company to apply the deposit in the manner suggested by counsel for the defendants. To my mind the meaning of both clauses 3 and 27 is clear and unambiguous.

On the question of damages claimed by the plaintiff company, it is to be observed that no evidence whatsoever was called on its behalf to show that any endeavour had been made to obtain the services of some other person to run the restaurant.

In *Bonham-Carter* v. *Hyde Park Hotel, Ltd.*,[2] Lord Goddard said, at p. 178:—

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it."

It may be mentioned in passing that the defendants did not give evidence in the court below and there was in fact no evidence whatsoever in relation to the damages claimed in the counterclaim. It follows that even if the licence had not been lawfully terminated, there would

have been no evidence on which the amount of damages on the counterclaim could have been assessed.

In the result the appeal is allowed only to the extent that the award of $1,500 by way of damages on the counterclaim is set aside. The plaintiff company will have the costs of the counterclaim in the court below but there will be no order as to the costs of the appeal.

Thomson L.P. and **Wee Chong Jin C.J. (Singapore)** concurred.

Appeal allowed in part.

LAM SOON CANNERY CO. v. HOOPER & CO.

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) April 27, 1965]

[Singapore — Federal Court Civil Appeal No. 110 of 1964]

Practice and procedure — Application to adduce further evidence on hearing of appeal — Evidence in possession of parties — Failure to exercise of all proper care and deligence to discover such evidence — Whether such evidence should be adduced on appeal.

Evidence — Further evidence — Application to adduce, on appeal.

This was an application to adduce further evidence on the hearing of an appeal. The evidence sought to be adduced consisted of a number of letters which have passed between the parties and/or their agents, which were in the possession of the applicants or their agents but it was alleged that they were embodied in a very large mass of correspondence and that their existence could not have been discovered even with the exercise of all proper care and diligence.

Held: as the evidence in this case was at all material times in the possession of the applicants it would be wrong for the court to exercise its discretion in their favour.

Cases referred to:—

(1) *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489, 1491.

(2) *Shedden* v. *Patrick* (1869) L.R. 1 H.L. Sc. 470, 545.

FEDERAL COURT.

J. Grimberg for the appellants.

C. L. Duff for the respondents.

Thomson L.P. (delivering oral judgment): This is an application to adduce further evidence on the hearing of an appeal.

It is not necessary to set out in detail the somewhat lengthy and complicated course of the litigation in which the matter arises which, of course, we shall have to consider at a later stage of the proceedings. The present application is simply to adduce further evidence. The evidence in question consists of a number of letters which have passed between the parties and/or their agents. These letters have not been produced at any previous stage of the proceedings and the ground on which it is sought to put them in evidence now is that even with the exercise of due care and diligence their existence could not have been previously discovered.

It is admitted in the supporting affidavit that at all material times the letters have been in the possession of the present applicants or one or other of their agents but it is said they had become embodied in a very large mass of correspondence which had come into existence in the course of a very long and complicated dispute and that their existence could not have been discovered even with the exercise of all proper care and diligence.

It is common ground that applications of this sort are regarded by this court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd* v. *Marshall*:—(1)

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible."

I pause to observe that these conditions are not alternative; they are cumulative. The applicants have sought to bring their case within the first of these conditions because it is conceded that it comes within the third and is not denied that it comes within the second.

As regards whether the evidence could have been obtained with reasonable diligence for use at the trial, we have considered what was said by Lord Chelmsford in the case of *Shedden* v. *Patrick*:—(2)

> "It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial."

These conditions stated by Lord Chelmsford are stated in the alternative and in our view the present application clearly falls within the first of these alternative conditions. It relates to evidence which was in the possession of the parties at all material times throughout the litigation.

In our view it would be wrong for us to exercise our discretion in favour of the present applicants.

We therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*